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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK
3 -----x
4 UNITED STATES OF AMERICA

5 v.
6 JONATHAN POWELL

17 CR 40 (AJN)
Arraignment

7 Defendant
8 -----x

9
10 New York, N.Y.
11 January 18, 2017
12 12:00 p.m.

13 Before:

14 HON. ALISON J. NATHAN
15 District Judge

16 APPEARANCES
17

18 PREET BHARARA

19 United States Attorney for the
20 Southern District of New York

21 CHRISTOPHER DiMASE

22 Assistant United States Attorney

23 LAW OFFICE OF LONDON & ROBIN

24 Attorney for Defendant

25 AVROM J. ROBIN

-Also Present-

CHRISTOPHER MERRIMAN, Special Agent (FBI)

PETER CASSON, Special Agent (FBI)

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1 (In the robing room; video arraignment)

2 THE COURT: Good afternoon. This is 16-MJ-7004,
3 United States v. Jonathan Powell.

4 I will take appearances beginning with the government.

5 MR. DiMASE: Yes. Good afternoon, your Honor.
6 Christopher DiMase for the government. Also present with me
7 here is FBI Special Agent Christopher Merriman.

8 THE COURT: Good afternoon to you both.

9 For the defendant.

10 MR. ROBIN: Avrom Robin for Jonathan Powell.

11 Mr. Powell is appearing via Skype from the law office of his
12 mother, Sarah Powell, in Phoenix, Arizona for purposes of this
13 arraignment.

14 THE COURT: Good afternoon, Mr. Robin.

15 And good afternoon, Mr. Powell.

16 THE DEFENDANT: Good afternoon.

17 THE COURT: So beginning with the appearance by video
18 conference, I have a waiver of appearance signed by Mr. Powell.

19 Mr. Robin and Mr. Powell, I do just want to confirm
20 that you signed this waiver of appearance on January 13. Is
21 that correct?

22 THE DEFENDANT: Yes, it is.

23 THE COURT: And you read it before you signed it?

24 THE DEFENDANT: Yes, ma'am.

25 THE COURT: And discussed it with your attorney before

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1 you signed it?

2 THE DEFENDANT: Yes, ma'am.

3 THE COURT: To the extent that you do have a right to
4 be here in person today, you are willing to waive that right
5 and appear by video conference?

6 THE DEFENDANT: Yes, ma'am.

7 THE COURT: If at any point, Mr. Powell, you have
8 difficulty with the technology, you can't hear what's going on
9 in any way, please let me know, wave your arms, whatever it
10 takes. I do want to make sure that you hear and understand
11 everything that's happening here today. OK?

12 THE DEFENDANT: OK. Just tilt the screen down a
13 little bit would be the only thing. Thank you.

14 THE COURT: Are you able to see me now, Mr. Powell?

15 THE DEFENDANT: Yes, ma'am.

16 THE COURT: Great. And you are having no difficulty
17 hearing. Is that right?

18 THE DEFENDANT: No, not at all.

19 THE COURT: So we are here, Mr. DiMase, for a waiver
20 of indictment, and then an arraignment on the information. Is
21 that correct?

22 MR. DiMASE: Yes, your Honor.

23 THE COURT: And then a scheduling conference.

24 MR. DiMASE: Correct.

25 THE COURT: I want to turn first to the information,

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1 Mr. Powell. That's the document that contains the charges
2 against you. Do you have a copy of that?

3 THE DEFENDANT: Yes, ma'am.

4 THE COURT: Have you had an opportunity to read it?

5 THE DEFENDANT: Yes, ma'am.

6 THE COURT: You understand that this document that
7 contains the charges against you is called an information, and
8 that it's been issued by the United States Attorney. Do you
9 understand that?

10 THE DEFENDANT: Yes.

11 THE COURT: You do have a constitutional right to
12 require the government to present evidence to a grand jury to
13 see whether the grand jury would vote to charge you with this
14 crime. Do you understand that?

15 THE DEFENDANT: Yes, ma'am.

16 THE COURT: And you understand what a grand jury is?

17 THE DEFENDANT: Yes, ma'am.

18 THE COURT: If the grand jury charges you with this
19 crime, the charge would be contained in an indictment rather
20 than an information. An indictment would be signed by the U.S.
21 Attorney and grand jury foreperson. Do you understand that?

22 THE DEFENDANT: Yes, ma'am.

23 THE COURT: I do have a waiver of indictment form here
24 that is dated January 18, 2017. I'm showing you -- can you see
25 the document, Mr. Powell?

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1 THE DEFENDANT: Yes, ma'am.

2 THE COURT: You have the original there with you. Is
3 that correct?

4 THE DEFENDANT: Yes, ma'am.

5 THE COURT: Did you sign this today?

6 THE DEFENDANT: I signed it last night.

7 THE COURT: Did you read it before you signed it?

8 THE DEFENDANT: Yes, ma'am.

9 THE COURT: Did you discuss it with your lawyer before
10 you signed it?

11 THE DEFENDANT: Yes, ma'am.

12 THE COURT: You understand that you are under no
13 obligation to waive indictment?

14 THE DEFENDANT: Yes, ma'am.

15 THE COURT: You understand that when you signed this
16 form, you were acknowledging your willingness to give up your
17 right to be indicted by a grand jury. Do you understand that?

18 THE DEFENDANT: Yes, ma'am.

19 THE COURT: Mr. Robin, am I correct that you witnessed
20 this waiver of indictment as well as someone who is present
21 with Mr. Powell. Is that correct?

22 MR. ROBIN: Yes, your Honor. I signed it separately
23 and PDF'd it to Mr. Powell.

24 THE COURT: Who is the witness?

25 MR. ROBIN: The witness is a relative of Mr. Powell's

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1 mother.

2 THE COURT: And she is present in the --

3 MR. ROBIN: She was present when he signed it.

4 THE COURT: Is that correct, Mr. Powell, of
5 Mr. Robin's understanding.

6 THE DEFENDANT: Yes, ma'am.

7 THE COURT: I authorize -- counsel, are you concerned
8 with the witness?

9 MR. DiMASE: Just for the record, two things. FBI
10 Special Agent Peter Casson has also joined us.

11 AGENT CASSON: Good afternoon.

12 MR. DiMASE: Second, if we could confirm -- I don't
13 expect this to be an issue -- but the name of the individual.
14 I don't know if it can be deciphered from the signature on that
15 form or not, of the witness.

16 THE COURT: Do you know, Mr. Robin, the name of the
17 witness.

18 MR. ROBIN: I'm not sure of her full name.
19 Mr. Powell, the name of the witness who signed?

20 THE DEFENDANT: Her name is Robin Cohen, C-O-H-E-N.

21 THE COURT: Robin, R-O-B-I-N?

22 THE DEFENDANT: Yes, ma'am.

23 THE COURT: Thank you.

24 MR. DiMASE: Thank you, your Honor.

25 THE COURT: I should also just establish competency to

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1 waive. Mr. Powell, I am going to ask you a few questions and I
2 will place you under oath for that.

3 (Defendant sworn)

4 THE COURT: I should make clear to you, Mr. Powell,
5 even though you're joining by video conference, if at any point
6 you do want to ask a question of your attorney and do so in
7 confidence and in private, you just let me know, and you are
8 more than welcome to do that at any time. OK?

9 THE DEFENDANT: OK. Thank you.

10 THE COURT: What is your full name?

11 THE DEFENDANT: Jonathan Cohen Powell.

12 THE COURT: How old are you?

13 THE DEFENDANT: I am 29 years old.

14 THE COURT: How far did you go in school?

15 THE DEFENDANT: I completed my bachelor's of
16 accountancy, and then I took my Master of taxation.

17 THE COURT: Have you ever been treated for any kind of
18 mental illness?

19 THE DEFENDANT: No, ma'am.

20 THE COURT: Are you now or have you recently been
21 under the care of a psychiatrist?

22 THE DEFENDANT: No, ma'am.

23 THE COURT: How about a doctor rather than regular
24 checkups?

25 THE DEFENDANT: I'm currently seeing a therapist right

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1 now about the incidents, and I was also court ordered as well
2 and voluntary as well.

3 THE COURT: Are you taking any medication related to
4 that?

5 THE DEFENDANT: No, ma'am.

6 THE COURT: Have you ever been treated for any type of
7 addiction including drug or alcohol addiction?

8 THE DEFENDANT: No, ma'am.

9 THE COURT: Have you taken any drugs, pills, medicine
10 or alcoholic beverages in the past two days?

11 THE DEFENDANT: No, ma'am.

12 THE COURT: Your mind is clear today?

13 THE DEFENDANT: Yes, ma'am.

14 THE COURT: And you understand what's happening here
15 today?

16 THE DEFENDANT: Yes, ma'am.

17 THE COURT: Does either counsel have any doubt as to
18 Mr. Powell's competence to waive prosecution by indictment?

19 MR. DiMASE: No, your Honor, I don't.

20 MR. ROBIN: No. For the defense, no.

21 THE COURT: Thank you.

22 Based on my observations of Mr. Powell through the
23 video conference, his answers to my questions and
24 representations of counsel, I do find him competent to waive
25 indictment, and I do authorize the filing of the information.

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1 Returning to the information, Mr. Powell, I think you
2 said you had an opportunity to read it. Is that correct?

3 THE DEFENDANT: Yes, ma'am.

4 THE COURT: Have you had some time to discuss it with
5 your attorney?

6 THE DEFENDANT: Yes, ma'am.

7 THE COURT: You have a right for me to read the
8 information to you or you can waive the public reading. Do you
9 waive the public reading?

10 THE DEFENDANT: Yes, ma'am.

11 THE COURT: How do you plead to the charges?

12 THE DEFENDANT: Not guilty.

13 THE COURT: All right. Thank you.

14 Turning to the scheduling conference -- well, let me
15 begin with you, Mr. DiMase.

16 MR. DiMASE: Yes.

17 THE COURT: If you would just summarize the charge in
18 the information and describe the categories of discovery that
19 the government will produce, and we will talk about a schedule
20 for that and a schedule for the case going forward.

21 MR. DiMASE: Yes, your Honor. I will do this with an
22 eye toward explaining the basis for our scheduling request
23 here.

24 This case began with an investigation into intrusion
25 of [REDACTED] in particular or a university located here

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1 in New York. And, actually, I may ask after the conference is
2 over to make that particular portion of the record sealed.

3 THE COURT: Just as a pause, that reminds me that I
4 did want to say I recognize the universities to the extent they
5 are victims are unnamed in the indictment.

6 MR. DiMASE: Right.

7 THE COURT: I wanted to confirm if either of them was
8 New York University?

9 MR. DiMASE: No, your Honor.

10 THE COURT: Then we can proceed. I say that only
11 because I teach at NYU, and I would want to make disclosures
12 related to that if they were.

13 MR. DiMASE: I may need a moment to check with the
14 agents because I will get to in a moment the investigation has
15 expanded beyond the original victim school, so there is some
16 possibility that --

17 AGENT: So far no.

18 MR. DiMASE: So, it sounds like so far NYU has not
19 been identified as a victim university.

20 In any event, there was a New York area university
21 that was identified as the initial victim. The IP address
22 which identified the computer that was conducting the intrusion
23 into the New York University systems came back to a computer
24 located at Mr. Powell's place of employment in Arizona.
25 Subsequent investigation revealed that it was in fact

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1 Mr. Powell using the device at his place of employment to
2 compromise the New York University systems, and essentially
3 what it shows is that Mr. Powell was gaining unauthorized
4 access to email accounts of students, staff and others of the
5 New York University system by resetting passwords using the
6 university's password reset utility. Once Mr. Powell gained
7 access to those accounts, he then used those accounts as a
8 jumping-off point to compromise other linked accounts, for
9 example, Facebook, Apple iCloud, iTunes, Dropbox, as a few
10 examples. He would essentially log into the other connected
11 account, have a password, reset emails sent to the university
12 account that he had compromised and used that email link to
13 reset the password for the connected account and then gain
14 access to the connected account. I know it's a little
15 confusing. Does that all make sense to you?

16 THE COURT: I'm with you.

17 MR. DiMASE: Very good. Ultimately it was determined
18 that the motive for doing this was to download sexually
19 explicit photographs and videos of women, whether from the
20 women's accounts, and in some cases men's accounts, who were
21 either dating or had some intimate relationship with the women.
22 We have been investigating whether there were other motives.
23 At least to date we have not found any other motives, for
24 example, a financial motive to compromise personal identifying
25 information in order to set up credit card accounts, things of

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1 that nature, although we are continuing to investigate that
2 possibility.

3 More importantly, subsequent investigation has
4 demonstrated based on an analysis of Mr. Powell's devices which
5 he actually consented to the search of, that it's two tablets
6 where he worked had connected to a massive number of
7 universities all over the country, some of which we were
8 already aware of, others of which we learned about from the
9 analysis of those devices. There are a subset of universities
10 which Mr. Powell appears to have focused on and so we have made
11 it a priority to communicate with those schools. There are
12 additional universities where there was less contact, and it's
13 our view that we have an obligation to at least notify those
14 schools and get some sense of level of intrusion on each
15 individual school. It's not necessarily clear from the
16 evidence we have whether Mr. Powell actually compromised an
17 email at a school. That's something we need to rely on the
18 school to tell us. We can only see he accessed their password
19 log-in portal, their student directory, things that suggest he
20 was trying. So we have definitely gotten some point along the
21 way in that process, but it is time-consuming given the number
22 of universities. So that is why we are asking for a 90-day
23 period to have a status conference.

24 I would say, I think both parties believe that this
25 case is very likely to resolve with a plea or some sort of

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1 pretrial disposition. Mr. Powell has cooperated in the form of
2 consenting to the search of his devices and also attending
3 several proffer sessions with the government very early on in
4 the case. But as far as discovery, a lot of it will consist of
5 those results in forensic analysis on the devices that we
6 searched, records from the various victim universities that
7 will show IP logs, other evidence of Mr. Powell's computers
8 connecting to their networks, and logs showing, where
9 applicable, compromised particular email accounts, and in some
10 cases, to the extent the university has information about it,
11 where Mr. Powell went next after compromising the email
12 account.

13 There would also be the category of evidence relating
14 to his employment at the company in Arizona, employment
15 records, forensic data from their side as well. I think there
16 are some sort of miscellaneous discovery items like phone
17 records and bank account records that we've collected in the
18 course of our investigation as well.

19 Finally, I should note that Mr. Powell outside of the
20 proffer sessions I mentioned, he did also give a full post
21 Miranda, post arrest statement in this case.

22 THE COURT: Has that been produced yet, or no?

23 MR. DiMASE: Nothing has been requested by way of
24 discovery to date, your Honor, and nothing has been produced.
25 I certainly would not have any objection, even if there isn't a

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1 broader discovery request, to producing that to the defense in
2 short order.

3 I think this may be a case where the defendant doesn't
4 necessarily ask for a full discovery production given the
5 circumstances as we continue to work toward a resolution, but
6 we can obviously address that by communicating with one
7 another. Obviously, if Mr. Robin has anything to add on these
8 points, he should be heard. That's some sense of where we
9 stand.

10 THE COURT: So the government's proposal -- can you
11 see me, Mr. Powell?

12 THE DEFENDANT: Yes, ma'am.

13 THE COURT: So the government's proposal would be to
14 only set a 90-day status conference control date and set,
15 obviously, not a trial date -- the request is not to set a
16 trial date, not to set a motions date, but what about a date
17 for discovery completion in the event that the defense is
18 seeking the full gamut of discovery?

19 MR. DiMASE: May I turn the computer towards me, your
20 Honor?

21 THE COURT: Yes.

22 MR. DiMASE: Mr. Robin and I did discuss this briefly
23 beforehand, although not in great detail. I guess my
24 preference would be to allow the parties in the 90 days, if the
25 Court is willing to grant us that period, to work out those

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1 discovery issues. And if at the end of 90 days it's clear that
2 there isn't going to be a resolution and there's still
3 additional discovery that hasn't been produced, on consent of
4 both parties to set a full and complete discovery deadline at
5 that point. Again, I defer to Mr. Robin to provide his view on
6 that as well.

7 THE COURT: I will hear from Mr. Robin.

8 MR. ROBIN: I'm in agreement with Mr. DiMase. We have
9 a very open line of communication on this. I don't have any
10 problems or road bumps at all. I anticipate we are going to
11 proceed that way, and for the defense we anticipate this will
12 be a plea case. I'd say that's pretty clear at this point. So
13 I think the time that between now and 90-day control date would
14 be useful. We need that amount of time, especially, because as
15 Mr. DiMase is telling us now, the investigation is still
16 ongoing. So it would be impossible to set a guideline range
17 without knowing the full scope of the crime.

18 MR. DiMASE: Your Honor, may I be heard briefly on two
19 additional points?

20 THE COURT: Yes.

21 MR. DiMASE: With respect to discovery, I neglected to
22 mention two additional counts. A Yahoo account and a Dropbox
23 account that Mr. Powell also consented to the search of by the
24 government. So in addition to the forensics analysis of the
25 devices, there would also be data recovered from those

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1 accounts.

2 The second point I wanted to make was that the current
3 information mirrors the charge that was contained in the
4 criminal complaint 16 MJ 7004. This charge pertains to the New
5 York area university only. And so one question that will have
6 to be addressed in terms of how this case is resolved is what
7 to do with respect to the other universities that are
8 identified as victim universities, whether those are covered by
9 additional Section 1030 charges, whether the Court would
10 consider them as relevant conduct. So I do agree with
11 Mr. Robin that the first order of business is to conclude the
12 investigation and determine the number and scope of the victims
13 here, and then the question, I think, that has to be resolved
14 between the parties is how to account for that conduct. As I
15 said, as of now, there's one simple Section 1030 charge.

16 There are also some legal issues regarding venue when
17 it comes to computer intrusions and on what grounds venue can
18 be based. This particular university does have servers located
19 in the Southern District of New York, so there is no question
20 that to the extent the allegations are proven that the venue
21 would be proper here. The majority of the schools, if not all
22 of them -- I think there may be a few other New York area
23 schools we have identified, but the majority are not in New
24 York nor are their servers in New York. So, maybe relevant
25 conduct is one way to address that, but I think that is

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1 something else the parties will need to address as we sort out
2 how to resolve the case.

3 THE COURT: Well, as counsel knows, my default rule is
4 to set the full schedule for the case at the initial
5 conference. There's a number of reasons for doing it that way
6 which I won't go into, but I am not inflexible, and so I will
7 deviate from that on consent here and put the case essentially
8 on no schedule other than a 90-day control date which brings us
9 to April 13, 2017, and I'm asking for it to be at 2:00 p.m. OK?

10 MR. ROBIN: That's fine. We consent to that. We
11 appreciate your Honor's going outside of her usual rules in
12 this case, which is a little unusual because it's still ongoing
13 to a large extent. I will put on the record now that if
14 April 13 is just a status conference, if we could waive
15 Mr. Powell's appearance so he could continue working full time
16 where he is in Arizona, it's just a procedural conference.

17 THE COURT: Mr. DiMase.

18 MR. DiMASE: Judge, to the extent that it is a
19 conference that relates to logistics, I don't have an objection
20 to that. If there comes a time in this case that obviously
21 there's any kind of guilty plea proceeding or a trial and a
22 sentencing of any kind, I think Mr. Powell should be present
23 for those proceedings; but with just standard pretrial
24 conferences, this seems to work well, instead of having to find
25 a flight each way, and I don't have an objection to Mr. Powell

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1 appearing by video conference.

2 MR. ROBIN: I would like to note for the record the
3 push for video was more by me than Mr. Powell. He was willing
4 to get on an airplane. I just thought it was not necessary in
5 these circumstances.

6 THE COURT: All right. So I will set April 13, 2017
7 at 2:00 p.m. as a conference date. My presumption is it will
8 be simply a scheduling and procedural conference without any
9 substance dealt with. I will ask you to come into that
10 conference at that point even if your investigation and
11 negotiations are ongoing, with a hopefully agreed-upon schedule
12 for the case at that point to be sure that we do keep the case
13 moving as is required.

14 I will ask you to have met and conferred in advance
15 and discussed a schedule for the completion of production of
16 discovery, a motion schedule and a proposed trial month or so.
17 You can confer with my deputy at the conference in advance as
18 to the Court's availability so that if we are setting a
19 schedule at that conference, we don't have to spend a lot of
20 time looking at calendars but can just put the schedule in
21 place, but I presume as I sit here that on April 13 we will set
22 a full schedule for the case.

23 Mr. Powell, to the extent that that conference is
24 simply a scheduling conference, I see no problem with your
25 knowingly waiving whatever right you have to appear in person

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1 at that conference, and I'm open to conducting it via video
2 conference again since it does seem to be working. You can
3 discuss that issue with your lawyer and make a decision as to
4 whether you want to be here in person or to submit a waiver as
5 you did in this case. OK, Mr. Powell?

6 THE DEFENDANT: OK. Thank you.

7 THE COURT: All right. So, applications.

8 MR. DiMASE: I do have an application to exclude
9 speedy trial time, but if you'd give me just one moment, your
10 Honor, I want to check with the agents about one other
11 question.

12 THE COURT: Yes.

13 (Pause)

14 MR. DiMASE: Yes, your Honor. I was discussing the
15 issue of the New York University area and I am asking for that
16 portion of the transcript to be sealed. To the extent the
17 government believes that that is --

18 THE COURT: Just a moment.

19 (Off the record)

20 MR. DiMASE: Thank you, your Honor. To the extent the
21 government thinks that is necessary, we will submit something
22 to the Court. I'm not going to make that application now.

23 THE COURT: So no application to seal the transcript
24 at this point, but you may seek to redact the name.

25 MR. DiMASE: If your Honor would be willing to rule on

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1 a request just to redact the name of the university and with
2 consent of the defense.

3 MR. ROBIN: Yes.

4 MR. DiMASE: I think that would resolve any concern
5 the government would have.

6 THE COURT: On consent, we will redact the name of the
7 university that was stated. And you've indicated it's not NYU.

8 MR. DiMASE: That's correct, your Honor.

9 THE COURT: No need to redact NYU then.

10 MR. DiMASE: No, your Honor.

11 THE COURT: Let me just go ahead and make my
12 disclosure on that in the event since you're still
13 investigating and then you have the information. I teach a
14 class at NYU as an adjunct. My spouse is a tenured faculty
15 member at NYU law school. As a result of my adjunct position,
16 I have an email address that's an NYU address. Obviously, my
17 spouse does. I live in NYU housing. So, I have a number of
18 affiliations with NYU. Even if NYU were an entity in this
19 case, as I sit here I don't see a problem, but I do want to
20 make the disclosure in the case either side has any concerns.

21 Let me just say if at some point you learn of NYU's
22 involvement in any way, obviously, you'd let defense counsel
23 know as soon as you possibly could, and I would just ask,
24 Mr. Robin, that within two weeks of learning that information,
25 you make any application if you have any concerns with respect

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1 to that.

2 MR. ROBIN: That's fine, Judge.

3 MR. DiMASE: I think we can also make it a priority to
4 look into that quickly and make sure there isn't an issue.

5 So, we do have an application, your Honor, to exclude
6 speedy trial time from now until April 13 of 2017 to allow the
7 government to produce any discovery that is requested during
8 that period by the defense, to continue to discuss a potential
9 pretrial resolution of the case with the defense, and for the
10 defendant to consider any pretrial motion defendant might wish
11 to file after the April 13 control date.

12 THE COURT: Mr. Robin.

13 MR. ROBIN: Yes. No objection.

14 THE COURT: I do find the ends of justice served by
15 granting the solution from speedy trial computations from the
16 period of today's date until April 13, 2017 outweigh the
17 interest of the public and the defendant in a speedy trial as
18 the time is necessary for production of discovery if requested
19 by the defense, a review of that discovery, time for the
20 parties to continue their discussions toward pretrial
21 resolution of the case, as well as time for the defense to
22 consider any pretrial motions.

23 Mr. Robin, any applications from the defendant?

24 MR. ROBIN: No, Judge. Nothing further.

25 THE COURT: Counsel, anything else I can address

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1 today?

2 MR. DiMASE: No, your Honor. Thank you.

3 THE COURT: Mr. Powell, just to confirm that from your
4 perspective you were able to hear and understand everything
5 that went on in the proceeding.

6 THE DEFENDANT: Yes, your Honor.

7 THE COURT: Terrific. I'm glad it worked out. So
8 we're adjourned. Thank you.

9 MR. DiMASE: Thank you, Judge.

10 (Adjourned)

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